JD–5–03
Chelsea, MA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

In the Matter of

KAYEM FOODS, INC.

and

CASES 1-CA-38544
1-CA-38830
1-CA-39339

UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 1445, AFL-CIO

William F. Grant, Esq., *Emily Goldman, Esq.*, and *Cristina Poulter, Esq.*, for the General Counsel.

Warren H. Pyle, Esq.(*Pyle, Rome, Lichten and Ehrenberg*), Boston, MA, for the Charging Party.

Ellen Kearns,Esq., Heather Carlson, Esq. (*Epstein, Becker & Green*), of Boston, MA, and *Jonni Walls, Esq.*(*Epstein, Becker & Green*), of Dallas, TX, for Respondent.

DECISION

Findings of Fact and Conclusions of Law

Benjamin Schlesinger, Administrative Law Judge. When the employees of Respondent Kayem Foods, Inc., began their attempt to be represented by United Food and Commercial Workers, Local 1445, AFL-CIO (Union), there followed, according to the complaint, a grant of promotions and a myriad of threats, interrogations, and disciplinary warnings and other discrimination, all in an effort to thwart the employees' union activities. Respondent denies that it violated the Act in any manner.[1]

Respondent, a family-owned corporation with an office and place of business in Chelsea, Massachusetts, has been engaged in the production of delicatessen meats and the distribution of those meats and other perishable goods to warehouses, distributors, and stores throughout New England. Annually, Respondent sells and ships from its Chelsea facility goods valued in excess of $50,000 directly to points outside Massachusetts and purchases and receives goods valued in excess of $50,000 directly from points outside Massachusetts. I

[1] The charge in Case 1–CA–38544 was filed by the Union on October 25, 2000, and amended on November 1, December 7, and December 28, 2000, and January 18 and June 7, 2001. The charge in Case 1–CA–38830 was filed by the Union on February 16 and amended on June 7, 2001. The charge in Case 1–CA–39339 was filed by the Union on September 7 and amended on October 16, 2001. The Amended Consolidated Complaint issued on January 14, 2002, and was further amended at the hearing. By inadvertence, although the amendment was granted, the exhibit which contained the amendments, G.C. Exh. 1(rr), was not received. It hereby is. The hearing was held on 13 days between February 5 and March 14, 2002, in Boston, Massachusetts.

conclude that Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. In 1999, employee Wilmer Sosa attempted to gather support for the Union, which led to an election that the Union lost. In June 2000, he began a new organizing drive, which led ultimately to the November 22, 2000 election and to this proceeding.[2] I conclude that the Union is a labor organization within the meaning of Section 2(5) of the Act.

The complaint alleges Respondent's application of the familiar "carrot and stick" to obtain its employees' favor. The "carrot" was used because many employees were dissatisfied with their status of being classified as "seasonal employees." Respondent obtained new workers, recent immigrants, many Latin Americans, particularly from Honduras, and gathering in the Chelsea area, from employment agencies, which paid the individuals and presumably employed them, although they were working on Respondent's products. A worker might have been in that status for well over a year, earning much less than Respondent paid to those employees on its direct payroll, and entitled to none of Respondent's benefit programs. If a worker was deemed qualified, Respondent would hire that person as a seasonal employee. The employee would then be paid directly by Respondent, but would be limited in the benefits received. Thus, Respondent did not pay its seasonal employees for health insurance coverage, paid vacations, and most other fringe benefits. That situation was codified in Respondent's 1998 employee handbook, which stated:

> **SEASONAL** employees are those who are hired as interim replacements or to temporarily supplement the work force. Employment assignments in this category are of a limited duration. Employment beyond any initially stated period does not in any way imply a change in employment status. Seasonal employees retain that status unless and until notified of a change. Seasonal employee are entitled to certain paid benefits.

Whether the employees' dissatisfaction with their status as seasonal employees led to Sosa's initial 1999 attempt to involve the Union was not explored at the hearing, nor was the reaction of Human Resources Manager Michelle Bustin, the daughter of Ray Monkiewicz, Respondent's president and CEO, and great granddaughter of Respondent's founder, Kasmiras Monkiewicz, after whose initials Respondent was named. At any rate, in the fall of 1999, she revised the handbook, knowing that the seasonal employees were unhappy with their lot, as was apparent from the testimony of many of the General Counsel's witnesses. Bustin testified that

> seasonal employees could be in that category or status for up to whenever. We had heard a lot of feedback from employees that they thought it was not fair to be in that category for one year, sometimes more. So, that was one of the things that Steve [Mosher, Respondent's then CFO/vice president of finance] and I decided to fix. We posted it. We knew employees would be very happy to see that this is a change.

The notice that Respondent posted in January 2000[3] revising its rules regarding the classification of seasonal employees, read:

---

[2] Originally, this proceeding also included the Union's objections to the 2000 election (Case 1–RC–21243). The Union withdrew them.

[3] All dates refer to the year 2000, unless otherwise stated.

a) An employee cannot continue in a seasonal position for more than six (6) months. The first rule permitted this for a period of twelve (12) months.
b) In the month of January and October of each year, there will be a review of each employee in a seasonal position. If there is a possibility that the employee can continue with the company, the employee will be promoted to the status of regular employee.
c) When a seasonal employee is promoted to a regular employee, all the time that the employee has worked as a seasonal employee will be credited towards the accumulation of benefits like vacations and personal days.

Respondent followed the posting of this notice with the issuance in March of its 2000 employee handbook, which contained rules regarding seasonal employees different from its January notice. It recited:

> **SEASONAL** employees are those who are hired to temporarily supplement the work force during peak periods. Employees will be designated as "seasonal" for a limited period. Seasonal employees retain that status unless and until they are notified of a change in status or six months elapse, whichever occurs earlier. Seasonal employees are entitled to certain paid benefits as set forth in the benefits section of this Handbook.

Neither the January or March rule was followed to the letter. During January, Respondent converted 14 employees from seasonal to regular employees. Before October, an additional 13 were converted: 2 in February, 5 in March, 1 in both May and June, and 2 in both August and September. There was no rhyme nor reason given for Respondent's choices of those whom it converted. Respondent did not automatically promote seasonal employees once they had been employed for six months. For example, 2 in January had been employed for 14 months, 2 in March for 11 months, and another 1 for 10 months, and 1 in both March and May for 8 months. In sum, both rules against employing seasonal workers for more than 6 months were ignored.

Nonetheless, Respondent relies on its earlier rule, which was superceded by the March handbook, to justify what occurred in October, the subject of the complaint. Then, the month before the election, Respondent promoted 42 employees, almost the total of those whom it had promoted during the entire year of 1999, when it promoted 44 employees. In that year, the most employees whom Respondent promoted from seasonal to full-time employees in a month was 15. And in the other 11 months of 2000, Respondent promoted only 36 employees, 6 less than it promoted in October alone.

The General Counsel contends that the timing of the promotions was geared to affect the results of the election, relying on the familiar rule that an employer violates Section 8(a)(1) when, during a Union organizing campaign, it grants pay increases or other benefit improvements "for the purpose of inducing employees to vote against the union" or is reasonably calculated to impinge on employees' freedom of choice for or against unionization, *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964), or "with an eye toward achieving union disaffection." *Acme Bus Corp.*, 320 NLRB 458 (1995). The Board makes no presumption that increases or improvements granted during an organizing campaign are unlawful, but it will draw an inference of improper motivation and interference with employee free choice from all the evidence and Respondent's failure to establish a legitimate reason for the timing of the increases, *Speco Corp.*, 298 NLRB 439, 439 fn. 2 (1990), especially when it has ignored employee complaints prior to learning of the organizing efforts. *Pembrook Management*, 296 NLRB 1226 (1989).

The record supports a violation. There is more than sufficient evidence that employees were concerned about their seasonal status and wanted to be converted to full-time employees; and Respondent's supervisors and agents promised that Respondent would address and resolve their concerns. Sandro Santiago, supervisor of the second shift kitchen, smoke house and muscle meat departments, after asking employee Marco Antonio Velasquez why he wanted a union, and hearing that he wanted to become a full-time employee, assured him: "I will fix that problem for you, just give me some time." Sometime later, Santiago directed Velasquez to talk to Glenda Petrillo, human resources recruiter,[4] who assured Velasquez that, if "that's your problem, we'll fix it." Velasquez was granted full-time status on November 6. A few weeks before the election, Santiago told employee Brock Satter that he would get full-time status after the election; and he did, on December 11. At an antiunion meeting of employees, Petrillo announced: "[W]e have some good news for you, Kayem employees, we've made some changes in your favor." These changes were that seasonal employees would get their benefits even without six months' employment, and these changes were being enacted "in order to help the Kayem employees."

That Respondent's promotion of employees to full-time status was motivated by the election, and not by any application of an established rule, is demonstrated by Respondent's selection in October of short-term employees for promotion, without credible explanation for those selections. It converted to regular employees Walter Mejía and William Leonard after they had been employed as seasonal employees for 4 days, and Martin Rosas and Wilfredo Rivera after 18 days. These were no "mistakes" by Petrillo, whom Bustin tried to blame. Petrillo testified that the supervisor requesting new employees specified whether the employees were to be full-time, seasonal, or part-time. In addition to these patently obvious, early promotions, there were many others. Although Respondent had previously promoted employees within a month or two of their employment, it had never done so in such numbers. Drago and Stjepan Jelec were hired on September 5 and promoted on October 20. Javier Mendez was hired on August 22 and promoted on October 2; Merlin Romero was hired on September 11 and promoted on October 20; Mehmid Brdanin was hired on September 18 and promoted on October 20; and Norma Salinas was hired on September 4 and promoted on October 16. I conclude that Respondent violated Section 8(a)(1) of the Act.

Another overriding issue during the union campaign concerned the status of Respondent's immigrant, Spanish-speaking employees, some illegal when first hired by Respondent, and working, under their own or assumed names, with purchased, counterfeit social security cards and invalid working papers. Whatever is happening in Chelsea, whether this is endemic of a problem that is better left to the Immigration and Naturalization Service (INS) than the National Labor Relations Board, it seems clear that Respondent had to be aware that some of its employees did not have valid working papers and made that an issue, not necessarily openly, but certainly one that permeated the conduct of the Union campaign.

The General Counsel contends that, in October, at the same time that Respondent was giving out the "carrot" of promoting employees to regular status, it was applying the "stick" to the immigrants by checking, for the first time since they were hired, their work authorization status. However, Jose Hernandez is the only employee who testified that he was asked for his work authorization documents in October and had not been asked for them since he began working for Respondent in 1992. Yet Respondent had his work authorization cards for other years,

[4] I reject Respondent's contention that Petrillo was not a supervisor within the meaning of the Act. At the very least, she was one member of a panel of three representatives who interviewed job candidates and made employment decisions about whom to hire.

which, despite his professed lack of memory, he appeared to have brought to Respondent. I do not believe him.

In addition, although the record does not show Respondent's practice before October 1999, when Julia Poveda, then the payroll coordinator, assumed her position, she was advised by Carmen Blakely, then human resources director, that one of her duties was to check the employees' work authorization cards (I-9s). Poveda did so first in about October 1999 by making up and giving to the supervisors of the relevant departments lists of the employees whose cards had expired. When the employees came to see her, she explained that she had to see new documentation. She made a record of when the employee brought in a new card or showed up-to-date documentation. She followed the same practice in March 2000 and again in October. There was, accordingly, nothing unusual in her actions in October 2000.

The General Counsel also relies on the testimony of Sosa to show that Respondent was harassing immigrant Honduran employees, whose cards, on their face, had expired. He explained to Poveda that his permit and those of the other Honduran employees had been automatically extended by the INS to December 5 and that, on her request, he brought her a copy of the INS Release. Nonetheless, she continued to require other Honduran employees to update their status. Sosa then complained to Petrillo, who was aware of the extension, explaining that he had shown the release to Poveda and that her continued requests for documents from Honduran employees were frightening them. He asked Petrillo why Respondent had not told Poveda to stop demanding work authorization papers from Honduran employees.

Poveda, on the other hand, had her list of employees with expiring or expired permits, and she called in all of the employees. She did not know their nationalities, and there is nothing in the record which shows that the employees, other than Sosa's hearsay declaration, were or should have been inordinately disturbed by following their supervisors' instructions and seeing Poveda. Indeed, employee Victor Sevilla explained to her that he was expecting a new work authorization soon and reminded her of the INS Release which Sosa had given her. She acknowledged that she had received it and told Sevilla to bring her his new permit when it arrived. I find no proof from Sosa's otherwise unsupported charge that Respondent deliberately harassed Honduran employees. Poveda was no longer an employee of Respondent and had no reason to fabricate.

There is no question that the status of the employees was raised as an election issue; and I find, contrary to the testimony of Packing Supervisor Dario Rodríguez, as well as others, that Respondent was well aware of its employees' fears. Found in the cafeteria and locker room a month or two before the election was a leaflet, a "Notice" or "Warning," in circulation only for a day, stating: "We the Union, want to assure you that if you vote for us, all your immigration problems will be in order, and have your immigration documents up to date. This is due to the fact that we want to be in good relations with NLRB." However, the Counsel for the General Counsel specifically disavowed Respondent's responsibility for this document.

The General Counsel also contends that, although Respondent's human resources department oversaw labor relations at both its Chelsea and Woburn facilities, Poveda did not ask employees at its Woburn plant for their immigration documents. The record fails to establish that Poveda was entrusted with ensuring that the employees at Woburn had valid documents or that Respondent employed at its Woburn facility any employees who were not citizens. Contrary to the contentions of the General Counsel, I find that it was not implausible that Bustin had no idea what Poveda was doing with respect to immigration documents, or what methods she used to maintain accurate and current I-9 records, simply because their offices adjoined. Accordingly,

there is no credible proof to find that Poveda's actions violated Section 8(a)(1) of the Act; and I dismiss the complaint's allegations.

On the other hand, several employees credibly testified that, during the course of the election campaign, supervisors threatened that the Union would make all employees have valid work documents. A week after Irma Rubiera returned from maternity leave on October 3, Petrillo asked her whether she "was with the union." Rubiera replied that she did not know. Petrillo said that the Union would make "drastic changes" by insisting that the employees prove that they had "legal papers." Otherwise, the Union would not protect them, and they would not be able to work for Respondent. Petrillo threatened employee Baltazar Ruiz that he and the other employees would lose their jobs because the Union was going to ask for the employees' work authorization cards, and those who did not have them would not be permitted to remain. Petrillo threatened Sevilla that the Union would require employees to have legal work permits. Liz Oatman, kitchen supervisor, told Sosa that he had "better make sure that [he] ha[d] a Green Card, with the Union coming [in]." I conclude that Respondent's threats violated Section 8(a)(1) of the Act.

I turn now to the multitude of allegations of threats made by various managers, supervisors, and agents of Respondent at antiunion meetings held with employees, as well as in individual one-on-one conversations from about June to the November 22 election, in which Respondent attempted to persuade its employees that the Union was not good for them and that they were better off without it. With regard to almost all of these allegations, Respondent's witnesses uniformly denied that they made the statements attributed to them by the employees. In fact, offered as exhibits were many letters distributed to the employees, carefully crafted, no doubt by Respondent's most capable counsel, which complied with the requirements of the Act. On the other hand, the issue still remains a matter of credibility; and in resolving that, I note that the kinds of threats testified to by Ruiz and numerous other employees were so varied, yet consistent with the kinds of arguments that Respondent was making against the Union, that the employees' testimony could hardly be wholly fabricated.[5] Indeed, as current employees, they testified adversely to their economic interest, and, regarding their allegations of threats and other Section 8(a)(1) conduct, they had nothing to gain by so testifying. See, e.g., *Flexsteel Industries, Inc.*, 316 NLRB 745 (1995), enfd. mem. 83 F.3d 419 (5th Cir. 1996); *Georgia Rug Mill*, 131 NLRB 1304, 1305, fn. 2 (1961), enfd. as modified 308 F.2d 89 (5th Cir. 1962). I found their testimony, although perhaps not perfect in all respects, sincere and compelling.

Indeed, certain testimony and admissions by Respondent support the finding that violations did occur. One series of allegations related to the threat that the Union had contracts with Stop & Shop with wage rates of $7.25 or $7.50. (Actually, one contract shows that employees were paid as little as $5.60–$6.00.) Thus, employees testified that the threat was made that, should the Union be successful in the election, employees' wages, then $10 or $12 or $13, would be reduced to what employees at Stop & Shop were paid. Respondent, while admitting that other collective-bargaining agreements with lower wages were shown to employees or talked about by supervisors, denied that they were accompanied by any threats. However, the whole reason for showing the other agreements, logically, was that the Union was not going to help the employees at all, but hurt them.

[5] I reject Respondent's attack on the credibility of those of the General Counsel's witnesses who worked with false work papers and social security cards. No doubt, they were clearly lawbreakers, but Respondent's contention might have had more force, had it terminated them for their fraud, which it did not, or had it not called as a witness on its own case a current supervisor, who also worked for Respondent illegally before obtaining valid working papers and whom it nonetheless promoted to supervisor.

A related claim was that, if the employees were successful in bringing in the Union, negotiations would start at zero. Indeed, Petrillo admitted exactly that: "[W]e did say that if the Union comes in, that they have to sit down with the Company and negotiate a contract and everything will start from zero" The employees testified that they had been told that, if the Union became their representative, Respondent would close and move away. Bustin testified that she asked Night Manufacturing Manager Thad Tomaszewski to come and meet with the first-shift kitchen employees because he had worked for a unionized company that had moved away; and he and all the other employees had to look for new jobs. Tomaszewski, however, denied that he had been asked to come in and relate his experience. "I volunteered to just, to come in and see what, between the shifts, if they were the same type of environment and questions." I find his answer false, an attempt to conceal his real purpose at the meeting, and contradictory to Bustin's avowed purpose of inviting him to attend. It is probable that he, as well as other of Respondent's witnesses, were attempting to conceal the very threats that the employees testified had been made.

In making these and the following credibility findings, I have fully reviewed the entire record and carefully observed the demeanor of all the witnesses. I have also taken into consideration the apparent interests of the witnesses; the inherent probabilities in light of other events; corroboration or the lack of it; the consistencies or inconsistencies within the testimony of each witness and between the testimony of each and that of other witnesses with similar apparent interests. Testimony in contradiction to that upon which my factual findings are based has been carefully considered but discredited. See, generally, *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962).

Where necessary, however, I have set forth the precise reasons for my credibility resolutions, bearing in mind the oft-quoted advice: "It is no reason for refusing to accept everything that a witness says, because you do not believe all of it; nothing is more common in all kinds of judicial decisions than to believe some and not all." *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2d Cir. 1950), revd. on other grounds, 340 U.S. 474 (1951), cited with approval in *Daikichi Sushi*, 335 NLRB No. 53, slip op. at 1 (2001). There are some misstatements of fact that weigh more heavily in my consideration, being purposeful rather than merely reflecting a misunderstanding of events. In such instances, it is reasonable to believe the very opposite of what the witness says, *Walton Mfg. Co.*, 369 U.S. at 408; and to disbelieve the witness utterly.

I, therefore, set forth my findings regarding the alleged threats made at the various meetings and in various conversations which occurred between June and the November 22 election. Due to the frequency of the meetings, in some departments three times a week, and because many of these threats were repeated and disseminated by other employees, the employees understandably could not recall when during this period they occurred. The lack of precise dates does not diminish the effect of Respondent's unlawful threats. Certain allegations contained in the complaint are not discussed, simply because their content was identical with or similar to yet other allegations of the complaint, but with different dates or different participants; and no attempt was made in the General Counsel's brief to link which testimony related to which paragraph or subparagraph.[6] In addition, even with as many Section 8(a)(1) violations as were alleged, the testimony of various witnesses seemingly went beyond the dozens of specific violations. All of them were fully litigated.

[6] I dismiss, because I could not find supporting testimony, Paragraphs 7(c)(iii), (iv), and (v), (e)(i), (f)(ii), (k)(vi) and (viii), (y)(i), and (z)(ii).

In an October meeting of the packing employees, Belsar Gonzalez, supervisor of the first shift packing department employees, stated that the Union was not going to work for the employees and would do nothing to protect their jobs, but representatives of it would have big cars and sit and drink coffee with Monkiewicz. The complaint alleges that this represented a threat that the election of the Union would be futile, but the statement indicates not what Respondent would do if the Union were elected, but a criticism of the Union. That may be disparaging, but not an unfair labor practice. But there was plenty in the record that constituted threats of futility. Gonzalez stated that the employees were not knowledgeable about and would be stupid to vote for the Union, which would only take the employees' money and would not gain anything for them, because they already had the benefits. The employees would have to strike, because Monkiewicz would not accept what the Union wanted; and he had the best attorneys in Massachusetts. Rodriguez told the second shift packing department employees that Respondent's rules would never change, and the Union could do nothing about it ("the union will not make it here"). Another employee quoted Rodriguez as saying: "[N]o union could change the company rules, because those were the company rules." Continuous Line Manager Viesha Walsh stated to the old kitchen and packing room employees that the relationship between Respondent and the Union would not work, because there were going to be two rules, Respondent's and the Union's, an indication that bargaining would never result in an agreement and thus would be futile.

Not only would the election of the Union gain the employees nothing; they would lose wages and benefits. Oatman told the employees from the old kitchen: "If [the] Union gets in you're going to lose everything. You're going to start from zero." Oatman told Sosa: "If the Union gets into the company, you're going to lose your wage. . . . [Y]ou're going to start from zero." Petrillo made essentially the same threat to Sevilla and to the kitchen and muscle meat employees (bargaining from "scratch"); Walsh, to the first shift kitchen and CT (the "new kitchen") packing employees; Employee Development Manager Alexandra Jaime,[7] to the CT kitchen employees; Bustin, to the second shift packing employees; and Tomaszewski, to the smokehouse employees. Bustin and Petrillo made clear that "zero" and "scratch" included the complete loss of benefits, such as medical insurance, holidays, and personal and sick days, when the union came in. Gonzalez apparently made the same claim, but Rubiera's testimony was unclear whether he said that the employees "almost always lose" or that he only "talked about losing."

The Board stated in *Taylor-Dunn Mfg. Co.*, 252 NLRB 799, 800 (1980), enfd. mem. 679 F.2d 900 (9th Cir. 1982):

> It is well established that "bargaining from ground zero" or "bargaining from scratch" statements by employer representatives violate Section 8(a)(1) of the Act if, in context, they reasonably could be understood by employees as a threat of loss of existing benefits and leave employees with the impression that what they may ultimately receive depends upon what the union can induce the employer to restore. On the other hand, such statements are not violative of the Act when other communications make it clear that any reduction in wages or benefits will occur only as a result of the normal give and take of negotiations.

[7] Respondent contends that that Jaime was not its agent. When acting as an interpreter, as she frequently did, she was an agent. In addition, even assuming, as Respondent contends, that she added to the remarks of those for whom she was translating, Respondent never repudiated any of her statements. Instead, Respondent set her up as a spokesperson, supplied her with the forum, and gave her the issues to talk about. Whatever private conversations may have been held were mere extensions of the meetings, where the principal points that Respondent made were repeated throughout the election campaign. *API Industries*, 314 NLRB 706, 706 fn. 1 (1994).

The employees' testimony demonstrated that Respondent uniformly threatened that they would lose everything and would have to bargain with it to regain some of what they had before, in violation of the Act. That threat of the loss of pay was reinforced by the repeated showing to the employees of provisions of collective-bargaining agreements with lower wage rates. On numerous occasions, Oatman showed the kitchen employees selected pages from a collective-bargaining agreement, with highlighting purporting to show what "bad thing[s] could . . . happen" if the employees joined a union. Those bad things were wage rates of $5.00–$7.50 per hour, far less than what Respondent's employees were earning. In addition, Oatman made note that the employees would also have to pay dues to the Union, thus further reducing what they would receive. Oatman also had numerous conversations with Sosa, showing him other Union agreements and repeating her threats that the employees would be paid only $6.75 per hour and would lose their holidays and insurance. Not only that, they would blame Sosa, as the leader of the Union campaign.

At meetings of the kitchen employees, sometimes joined by the employees in the muscle meat department, Petrillo made numerous threats that the employees would have to start negotiating salaries starting at $7.50. Similarly, in October or November, Jaime, in the presence of Gonzalez, showed the same or a similar agreement to the packing employees, with a salary ("$7 something") that was very low compared to the employees'; and she said: "[I]f [you] will vote union, that could happen to [you]." I glean from the testimony of Maintenance Supervisor Alonso Munero that the only purpose of showing the Stop & Shop agreement was to bolster Respondent's position that the reduction in wages to as low as $5.60–$6.00 might result from electing the Union as the employees' bargaining representative.

Rodriguez showed the employees from the second shift packing department the Stop & Shop contract, noting that perhaps the employees will be able to make the same money that the Stop & Shop workers were making. Although Rodriguez said that the Stop & Shop contract was the result of negotiations, and in negotiations the result "could go up or it could go down," in the employees' case it would go down because the employees "were already earning the maximum that they were paying in other Companies" and "it will be more probable that it will go down." Tomaszewski, too, threatened a reduction of pay, showing the contract with the lower starting wage to the smokehouse employees and saying, "[T]his is what the UFCW has done for these workers, why would you – why would you want this? So you would come out, you know, starting at $7 an hour." About two weeks before the election, Munero threatened that employees would make minimum wages, because the Union could not force Respondent to pay any more than what the law states.

Threats that Respondent would move or close or declare bankruptcy abounded. In an October meeting Gonzalez threatened the packing employees that Respondent could move out of state if the Union won the election. Monkiewicz threatened that Respondent could close or move to a different place or go bankrupt. At a meeting of the CT kitchen employees presided over by Walsh and Jaime in early October, after making the "bargaining from zero" threat, Jaime threatened that, if the Union won and Respondent and the Union did not come to an agreement, Respondent could, to "avoid all those problems," move to another State or even close down. At one meeting, Rodriguez explained that sometimes when the company owner did not want to accept the union, and the employees elected the Union, the company would move to a different location. He also explained that a company could declare bankruptcy, and all the employees would be out of a job, except him, because when he left there, he had another job. He threatened that, if Respondent closed down, the Union would keep all the dues money, and the employees would be without both their jobs and the dues money.

Tomaszewski showed the employees records of some companies which, because they had become unionized and had made such high demands, had gone out of business or relocated. At yet another meeting, Rodriguez said that, if the Union won, Respondent would possibly bring in new employees and lay off or fire the old employees. At another meeting, someone in management said that, if the Union came in, Respondent would go broke. At one meeting, CT Supervisor George Porcella told the employees that he had worked before for a company that was unionized, that that company went bankrupt because of the union, and that he lost his job. He threatened that the same thing that had happened to that other company would happen to Respondent. At another meeting, this time of the packing room employees, towards the end of October, Porcella asked if any of the employees would be for the Union. When nobody answered no, he said that he did, that he was employed by DeCosta, which was unionized; and, thanks to that union, he lost his job. Thanks to Respondent, he recovered his job, and was working again. If the employees were interested in seeing what had happened to DeCosta, they should vote for the Union; but, if they were interested in keeping their jobs, they should go with Respondent. Rodriguez corroborated Porcella's narration, noting that he had come from DeCosta and been rescued by Respondent. The clear implication of the references to the fate of DeCosta was that Respondent's fate would be the same, should the employees vote for the Union.

There were also numerous threats that negotiations would result or end in strikes and that would cause Respondent to close and employees to lose their jobs. Bustin informed employees that a strike was inevitable and would begin when the Union tried to change Respondent's mandatory weekend work policy, which the employees were complaining about, and Respondent refused, as it had to because Respondent sold items to supermarkets and needed employees to work over the weekends. Munero also implied the inevitability of strikes, saying, "When the Union is taking to strike, you are not going to win. You may lose many benefits." Rodriguez said that companies which had unions spend their time on strike. Respondent would not accept any Union proposal to make changes; and, in that event, the employees would have to strike. Jaime also predicted that, if Respondent was unwilling to accept what the Union was proposing, the employees would go on strike, which could last for days or months, without pay. As a result, Respondent "could lose some clients by not being able to have product and deliver, and fill the orders. And without clients, the company eventually could close down."

Walsh stated to the old kitchen and packing room employees that Monkiewicz would decide whether to agree to the Union's demands. If he did not want to pay what the Union asked for, then the only recourse that the Union had was to strike, that would take anywhere from one week to one month, and during that period Respondent could permanently replace the employees, who "would not have [their] jobs back." In addition, the strikers would not have health insurance and, if any of their relatives became sick, the strikers would not be able to take them to the hospital. Oatman threatened the old kitchen employees that, if the parties could not reach an agreement, the Union would have to strike, in which event Respondent, which relied on making a product daily, could not make its product and would have to go out of business. All the 300–400 employees would lose their jobs and would have no insurance and no benefits.

Respondent also threatened that unionization would result in customers refusing to deal with Respondent and that would cause strikes, closure, and bankruptcy. Thus, at one meeting led by Santiago, Jaime, and Petrillo, Petrillo said that, if the Union was successful, a consequence would be that clients, such as Stop & Shop and Shaw's, would stop buying products from Respondent; and, in case there would be a strike, no one would buy from Respondent, and the employees could lose their jobs. At meetings of the smokehouse and muscle meat employees, Tomaszewski said that he had previously worked at a union company,

and he knew first-hand why a union was no good: the company shut down and moved to a different state, and everybody lost their jobs. That could happen at Respondent, and that was the reason that the employees should be against the Union. He told the same employees that, if the Union won the election, other companies would not want to deal with Respondent because it was a union company; and so Respondent would lose business and be forced to close. At a meeting of the second shift kitchen employees, Tomaszewski said that, when a union organized, its customers would not buy DeCosta's product and it went bankrupt. At a meeting with the old kitchen and packing room employees, Walsh said that Respondent had operated without a union for many years, that a union was unnecessary, and that, if the Union won the election, Respondent would close or could declare itself bankrupt or would move to another state.

There were a number of miscellaneous allegations. One was that Rodriguez said that, if the employees selected union representation, it would be either impossible or very hard for the employees to change their mind thereafter and rid themselves of it.[8] This was at most a misrepresentation or misstatement of what one of the consequences of unionization would be. There was no threat that Respondent was going to take any action that would discriminate against its employees because of their exercise of their Section 7 rights. But Tomaszewski's statement to the smokehouse and muscle meat employees that, if the Union were successful, Respondent would "play hard ball"; that an employee would be disciplined for "any little thing"; and that, if an employee came in a couple of minutes late, Respondent would not stand for it, was clearly an unlawful threat of stricter enforcement of Respondent's rules because the employees voted for a union.

The complaint alleges that Respondent enacted an illegal no-solicitation rule. Paulino Suero testified that, before the 2000 union campaign, Respondent imposed no restriction on talking by employees. When the campaign started, however, if Oatman saw Suero talking to a coworker, she clapped her hands and said: "Hey, hey; you can't talk here; come on; come on; move it." He was the only witness to so testify, and this is scant evidence of the adoption of a no-solicitation rule, particularly because Oatman did not speak Spanish and did not understand what Suero was saying. In fact, he testified that Oatman sometimes stopped him from talking when he was not talking about the Union at all. (Other times, he was.) The General Counsel's theory, as articulated at the hearing, was: "There was a restriction on the subject they [the employees] were permitted to discuss." That was not proved factually; and I find as a matter of law no general no-solicitation rule. I dismiss this allegation.

Related above was a meeting held near the end of October, where Porcella asked if any of the employees would be for the Union. Although the employees did not respond, that was an unlawful interrogation, as are the following conversations, in which Respondent's representatives and agents peppered their interrogations with threats of closure, bankruptcy, and moving in the same manner as found above. As also recited above, in October, Petrillo interrogated Rubiera about whether she "was with the union," adding threats about employees having "legal papers." At the end of October, Rodriguez called employee Eliezar Ordonez into his office and asked how he felt about his job and how he felt Rodriguez was treating him. After some discussion of Ordonez's various gripes, Rodriguez then turned to the subject of the union campaign, asking Ordonez why he was supporting a union. Ordonez gave his reasons, Rodriguez disagreed, and the two proceeded to debate the topic of the Union.

[8] This was alleged three times in the complaint, but attributed to others, not to Rodriguez.

About two weeks before the election, Petrillo asked Suero to come to the human resources office and, when he got there, asked him what he thought about the Union. He said that he had heard that the Union was good, and she replied that she did not think so, asking him to recall what had happened at DeCosta, which "went broke because the Union got in." Suero disputed her contention, insisting that the company had merely lost business; but she replied that the company's downfall was because of the union's excessive money demands. She followed this with a statement that it was "a pity to see how many people are losing their jobs" and the threat that "if the Union comes in, we could lose some of the things that we already have." About one month before the election, Petrillo asked Satter what he thought about some of the information that had been provided at Respondent's pre-election meetings. Satter replied that he found the information "interesting," to which she responded that she hoped the employees appreciated what they had at Respondent and made the right decision.

As partially recited above, Petrillo promised to convert Velasquez from a seasonal to a full-time employee, about two weeks before he was converted. In that conversation, her knowledge that he wanted to become a full-time employee came about only because she asked him three times if he had any problems at Respondent. She told him that there was a group of employees that were interested in a union; but she said that Respondent was a good company that did not need a union, which was only after the employees' money. Oatman sent Sevilla to talk to Petrillo, who first asked whether he talked to Oatman about the Union. Sevilla replied that he did not; he had talked to her to ask for a raise. She seemed to duck the subject, so he asked whether she really wanted to talk to him about the Union. She then asked him what he thought about the Union, and he questioned that she should ask, saying that it was "something personal." The conversation did turn, however, to a discussion of the Union, in which she threatened that, if the Union won the election, "some things were going to be more strict"; that contract negotiations would start from zero; that employees might lose benefits but, in any event, their benefits would not improve; and that, if the demands made on Respondent were too great, it might declare bankruptcy or move elsewhere. Petrillo approached Ruiz, who was on his lunch break, and asked him what he thought about the Union. He replied that he had not made up his mind. She threatened that his salary would be reduced to $7.25 or $7.50 per hour, he would lose his medical insurance, and Respondent might move.

I conclude that Respondent violated Section 8(a)(1) of the Act by interrogating its employees, soliciting their complaints and grievances, and promising to improve their terms and conditions of employment if they refrained from selecting the Union as their collective-bargaining representative, and making the other threats that the record so amply documents. it was nonetheless coercive because, among other factors, it occurred at a time when Respondent was committing numerous other unfair labor practices. *Medcare Associates, Inc.*, 330 NLRB 935, 939 (2000); *Rossmore House*, 269 NLRB 1176 (1984), enfd. sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). The kinds of threats made by Respondent, recited above, so clearly violate the Act that case citation is hardly necessary. Respondent threatened, without any factual, objective basis, that if the Union was successful, Respondent would declare bankruptcy or would move or close or be sold. Respondent threatened that the employees would suffer reductions of pay and loss of benefits; that Respondent's rules would be strictly applied; that the election of the Union was an act of futility, because Respondent would give nothing; and that bargaining would result in strikes, which in turn would result in their loss of jobs.[9] I conclude that Respondent violated Section 8(a)(1) of the Act in all the respects found above.

[9] The Board has "made it clear that employers cannot tell employees without explanation that they would lose their jobs as a consequence of a strike or permanent replacement." An employer must convey to employees that they

Continued

What remains in the complaint is a group of Section 8(a)(3) and (1) allegations, the majority concerning Sosa. Two facts, in particular, persuade me that Respondent was driven by a desire to discriminate against him, a leader, often outspoken, of the organization drive. The first was Respondent's change of its normal practice of insisting on a doctor's note from an employee, only when the employee had been absent from work for three days. Respondent required Sosa to produce one, even though he had been absent for only two days. The second was Respondent's belated change of the requirements of a job which Sosa had almost successfully bid for. When one of the requirements, the knowledge of English, favored Sosa, Respondent eliminated that requirement at the end of the bidding process, thus taking away Sosa's advantage for the job and permitting Respondent to promote another employee. I find, therefore, that Respondent, particularly Bustin, disciplined Sosa because of his union activities and believe little of her other explanations.

In July, as Sosa, Suero, and Sevilla were eating lunch in the cafeteria, Petrillo came over to their table and asked whether they had any items for Respondent's newsletter. The employees had been discussing their concerns that Respondent had been hiring Spanish-speaking employees through a temporary employment agency, with low pay and no benefits, but hiring Bosnian, Polish, and American employees directly as employees, with higher pay and full benefits. Sosa asked Petrillo: "How come you just hire people from the other one and you was a Spanish people, why you don't, you know, do something for us?" She explained that the United States government pushed Respondent to hire Bosnians because of the war. Sosa chastised Petrillo, as a "Hispanic," for not doing more for Hispanic employees. Petrillo was offended, and reported to Bustin that Sosa had said, "I know that you are 'Hispanic,' [at which point Sosa made quotation marks with his hands] but you are on the other side." Petrillo testified that she felt offended because he made the quotation marks and "he started telling me about all the good things that he does for people." According to Bustin, however, Petrillo reported that Sosa said: "[Y]ou are not Hispanic. You are acting like a white person. You are only hiring white people, like the Bosnians." Bustin issued an oral warning to Sosa, dated July 14, based on the fact that he "disrespect[ed] or insult[ed] other employees."

Sosa was engaged in protected and concerted activities, discussing a complaint shared by employees about Respondent's hiring practices and employment of Hispanic employees for less pay and benefits than other employees. That Petrillo, who in her position could have done something about Sosa's complaint, may have disagreed was not disrespectful. That Petrillo was insulted does not inflate the incident to anything more than a difference of opinion with another employee, and to try to make it more than that is exaggerated and unjustified. I note particularly that Bustin accused Sosa of having said that Petrillo was "acting as a white person," thus making a racial slur. Not even Petrillo corroborated that accusation. Rather, Bustin concocted it to make it appear that Sosa had said something that she, at least, deemed worthy of a warning.

When confronted by Bustin, Sosa denied that there was any malevolence in his conversation with Petrillo. Sosa was not the kind of person who would have admitted, as Bustin testified, her charge. Furthermore, in denying his guilt, Sosa told her that the conversation was heard by Suero and Sevilla. Bustin talked with neither to confirm Sosa's version or even support what Petrillo had reported to her. Bustin's rush to judgment, supporting the allegedly offensive remarks made to Petrillo, an active participant in Respondent's antiunion campaign, was hasty

---

would have recall rights in the event of a strike under *Laidlaw Corp.*, 171 NLRB 1366 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1969). *Baddour, Inc.*, 303 NLRB 275 (1991).

and uncorroborated and another indication that she wanted to pin disciplinary action on Sosa without being sure of her facts.

The General Counsel has presented a prima facie case of discrimination under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). Sosa was a well-known Union supporter. The General Counsel has proved animus from Respondent's numerous violations of the Act, found herein, as well as the selection of Sosa for special, discriminatory treatment, inflating a difference of opinion far beyond its worth and refusing to investigate the facts from impartial witnesses. Respondent did not prove that it would have taken the same action, even in the absence of his union activities. *Wright Line*; *Naomi Knitting Plant*, 328 NLRB 1279, 1281 (1999); *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996). I conclude that Respondent, by giving Sosa the warning, violated Section 8(a)(3) and (1) of the Act. These same findings and this same conclusion applies in each of the following instances where I have found unlawful activity engaged in by Respondent in violation of Section 8(a)(3) and (1) of the Act.

On August 21, Respondent changed Sosa's starting time from 5:00 a.m. to 7:00 a.m., "since he seems unwilling to stay in the kitchen and has become very selective about what he is willing to do during pre-op." The memorandum left in his file recited Sosa's "continued unwillingness to work as part of a team and . . . his constant disregard for instructions to stay in his department before and during pre-operational inspection." About two or three weeks before, as a result of the assignment of a new USDA inspector who was very strict and who apparently delayed the start of production, then Plant Manager Dennis Gerwig assigned Sosa, Sevilla, and Baltazar Ruiz, all kitchen workers, to begin work two hours earlier, at 5:00 a.m., to assist Respondent's quality control employees who were responsible for inspecting and cleaning equipment. What happened several weeks later is at issue. Respondent's brief contends, relying solely on the testimony of Liz Oatman:

> At one point in time, Sosa, Sevilla, and Ruiz were asked to not only inspect the equipment, but to clean it and then sign a form indicating that the equipment was clean. Sosa, Sevilla, and Ruiz did not want to sign the forms, which were written in English, because they said that their English was weak. The Company asked them to do their best with the pre-op work and said that it would look for somebody else to help them sign off if they were uncomfortable doing so. Sevilla and Ruiz continued to perform the pre-op inspection and cleaning, but they stopped signing the forms. Sosa, however, refused to do any further pre-op work after a few days and was very uncooperative during pre-op. Sosa met with Oatman and Dennis Gerwig, the former Plant Manager. During that meeting, Sosa complained that his English was not good enough to be signing off on forms, and he said that he felt that pre-op was not part of his job. Sosa also objected to participating in the inspection process unless he was paid as a Quality Control employee. Gerwig asked Sosa to continue to help the group because he knew his equipment, and he even offered to have Quality Control employees walk around with him. Nevertheless, Sosa refused to help out with pre-op in any manner. Therefore, Sosa was removed from doing pre-op responsibilities, and his starting time was changed until after the pre-op inspection was complete. [Footnote and page and exhibit references omitted.]

Thus, according to Oatman, Sosa's hours were changed because he refused to inspect and clean the equipment. However, Sosa testified that Quality Control Supervisor Jon Trelfa told the kitchen employees that he wanted them only to inspect the machines. If they discovered

equipment that needed cleaning, they were to notify the sanitation crew, who would do the cleaning. Trelfa did not testify and thus did not deny Sosa's testimony, which was corroborated by Sevilla. In addition, both employees testified that Trelfa specifically told Gerwig that they were only to inspect the equipment, not to clean it. Finally, an issue arose about whether the employees were to sign the USDA inspection paperwork. They did not want to because, regarding Sosa, he would be held accountable and, regarding Sevilla and Ruiz, they could not read English. When the latter two stopped signing the reports, they were not disciplined. When Sosa stopped, Gerwig directed him to continue. When he refused, because he believed that he was being asked to do a quality control job, for which he was not being properly compensated, Gerwig gave him a choice to do as he directed, or to begin work at 7:00 a.m., after pre-op was completed. Sosa complained that he was being discriminated against: "'Why? There is three inspector; Javier, Baltazar and me and why he's going to do that just with me?"

There is nothing to suggest that Sosa was unwilling to continue to inspect the equipment. Rather, it appears evident that Respondent selected Sosa, one out of the three kitchen employees, to be removed from this assignment, despite the fact that he was willing to continue to do precisely the work that was being performed by the other two. Under *Wright Line*, the General Counsel has made a prima facie showing that Respondent picked out Sosa for removal from the inspection team, leaving the two others on the 5:00 a.m. assignment. The burden then shifted to Respondent to prove that it would have selected him, notwithstanding his position as a leader of the union campaign. Respondent did not do so for a variety of reasons. First, Respondent did not call Trelfa. Thus, Oatman's testimony that Sosa was required to clean the equipment was contrary to Trelfa's uncontradicted statement that the kitchen employees did not have to do that. Second, Respondent, although it explained that Gerwig was no longer employed by it and resided in Seattle, made no showing that he was unavailable to testify as a witness.

Third, I did not believe Oatman at all. Gerwig's August 21 memorandum to Sosa's file indicates that three persons were present with him when he reprimanded Sosa: Ira Seskin, Tuan Nguyen, and Ralph Quimby, none of whom testified to support Oatman's testimony. Furthermore, the memorandum indicates that Gerwig was taking action against Sosa not only because he was not doing what Gerwig allegedly asked him to do but also because of "constant disregard for instructions to stay in his department before and during pre-operational inspection," which is an additional and conflicting reason for Respondent's action, at complete variance with Respondent's other testimony.

Accordingly, I find that Respondent placed an unfavorable memorandum in Sosa's personnel file and changed his starting time in violation of Section 8(a)(3) and (1) of the Act.

The complaint alleges that Respondent failed to consider or promote Sosa to the position of team leader in the kitchen department on the second shift because of his union activities. Respondent posted the position on August 25, and three candidates applied, Sosa, Jose Ramon Hernandez, another union supporter, and Victor Morales, whom Sosa originally thought was a Union supporter, but was not. Sandro Santiago, the newly designated second shift kitchen department supervisor, one of three making the decision (with Tomaszewski and Petrillo), was aware that Sosa and Hernandez supported the Union, but was unaware of Morales's union sympathies.

There are a number of facts that support the allegation that Sosa was treated differently or discriminatorily. First, Petrillo listed two starting dates for Sosa, indicating that he had changed his social security number. No such entry was made for Hernández, despite the fact that he, too, had changed his number. (The record is less clear that Morales did, also. His

payroll jacket shows a change of his social security number, but there was otherwise no proof that that resulted from a fake number or was merely the result of an error. The record reveals no change of his date of employment, for seniority purposes, and there was no testimony about this subject.) Second, Respondent relied, in part, on a review of the applicant's employment record. The documents that Petrillo prepared for the review of the candidates' qualifications stated that Sosa had been disciplined twice; but one was the one found unlawful above, and Respondent violated the Act by relying on it. Third, Santiago also relied on the fact that Sosa did not get along well with or was bothering his fellow employees, a fact that he gleaned from other employees; but their feelings, which were otherwise unexplained, may well have resulted from Sosa's outspoken support of the Union. Finally, at least from Sosa's perspective, Morales was not a Union supporter, although this was not proved.

On the other hand, the evidence that Sosa spoke better English than the other two candidates was not particularly persuasive. A team leader had to have sufficient knowledge of English to complete the necessary paperwork and to communicate with USDA representatives, supervisors, team leaders from other departments, and coworkers, many of whom do not speak Spanish. Although Sosa's English was probably better than Morales (Bustin so conceded), there is nothing persuasive in this record that Morales did not speak, comprehend, or read English sufficiently well enough to be qualified for this promotion. The General Counsel's claim that Sosa had more experience than the other employees is belied by the fact that Morales had broader experience in the variety of departments that Santiago supervised on the second shift and thus was able to be of more help to him. In fact, Morales had substituted for the team leader in the kitchen department. Sosa's claim that he also was a team leader in the kitchen department was credibly denied by Respondent's witnesses, who testified that he had experience only in blending and grinding, and belied by his own admission that Jesse Johnson was the team leader in the department. Admittedly, Sosa did his job well, and Oatman had asked him to help out when Respondent started to run the second shift "because he was experienced on running the high-tech," could set up the equipment, and help out the new temporary employees if the equipment broke down. There is no evidence, however, that proves that he was also substituting as a team leader at that time.

While the General Counsel may have made a prima facie case by showing some disparate treatment of Sosa and the possible consideration by Respondent of unlawful discipline or lawful protected and concerted activity, Respondent has also shown that, based on Morales's experience, Respondent would have selected him in any event. I thus find, under *Wright Line*, that Respondent has met its burden of proving that it would have taken the same action in refusing to promote Sosa, even had it also been motivated by Sosa's union and concerted activities.

On September 29, Respondent summoned Sosa to the first floor conference room, where Bustin, Gerwig, Oatman, and Santiago were present. Bustin gave him a final warning for harassing three employees, two of whom were Angel Padilla and Morales. Sosa had called Padilla names, including "snitch" and "kiss-ass," and had threatened to cause Padilla to lose his job. Morales complained that Sosa was "getting in his face" and calling him names to other employees and called him a homosexual. Sosa denied these allegations, informing Bustin that he had not even heard the word "snitch" before. Sosa also demanded that he face his accusers; and Morales, who was summoned, alleged (according to Bustin): "Wilmer has been getting in my face, telling me that I do not deserve the Team Leader job. He is doing this every single day and I want it to stop." Bustin added, only after having her recollection refreshed, that Morales also accused Sosa of calling him a homosexual. Sosa was not accused of using the word "kiss-ass" in reference to Morales; yet, for some unexplained reason, Bustin's written warning contained that accusation.

Sosa denied that he made any such comments. None of the employees, including the third unidentified employee, testified, so there is nothing in the record to support the warning, save Bustin's testimony, so much of which I have not credited. What makes her testimony about Padilla so suspect is that there is nothing in the record which puts the words that Sosa allegedly uttered into any believable context. Admittedly, according to what Bustin wrote in an accompanying document, "This final warning is being issued because several employees have complained that Wilmer Sosa is badgering and harassing them because they do not agree with Wilmer's Pro-Union sentiments." Assuming that that is true, there is no reason that Sosa should be accusing Padilla of being an informer or a sycophant. In fact, Sosa explained to the four company representatives that he had a cordial conversation with Padilla:

> That time when he spoke to him about Union, he told me that he was in the Union before and the Union was a good, I mean, a good team, that we should be have a Union in Kayem. He said that he work in the airport with the Union, I don't know, that's what he was saying to me so we had a good conversation. And I also, that day when I spoke to him about it, I told him that we had another person who was doing his job before, his name was -- his name is Felix Chavez, he was cooperating with us because housekeeping, they are always in the hallway, they see people from the first shift, third shift, second shift, they see the all employees, the whole shifts so I told him that Felix Chavez, he was helping us –
> . . . .
> So I -- that's what I told Michelle, the conversation that I had with him that was because of the Union and I also told Angel Padillo that Felix Chavez was one of the person who was supporting the Union campaign, you know, like passing flyers, asking people for signs card. I invite Angel Padillo, you know, to meetings, if I ask him if he will like to, you know, do what Felix Chavez was doing at that time, he said, "Yes". I told Michelle that I was surprised, how I never have any argument or any discussion with Angel so I was, I mean, confused at how they came out that I harassing him, that I told him that he's going to be losing his job. Who am I? I'm just a regular employee over there, that the Company wants to fire me, how can I be firing another person? I don't have any authority, I told Michelle that.

If Sosa was attempting to befriend Padilla in order to make him a Union adherent, he would not have engaged in the conduct that he is accused of. In addition, Sosa claimed that he would not have insulted Morales for two reasons: first, he thought that Morales was a Union supporter; and, second, Morales did not work on the same shift as he did, so there was hardly any opportunity for these daily conversations to occur. Sosa did admit that he felt that Hernandez deserved the team leader position, because he had more seniority than Morales, a position that may have offended Morales. Bustin, however, apparently without much thought, was quick to credit unknown accusers and rumor, because Sosa had lied to her twice before, which she expressed to Sosa. The first incident was the one involving Petrillo, discussed above, and I have already found that Sosa did not lie. The second incident was one in which Sosa did lie:

> [Bustin said], "Remember that day when we were in the office, the Human Resource Office, that you said that you was not a Union supporter and yes, you are". I say to her that I'm not lying to her, that what I said to her was because I was afraid to lose my job by saying that to her because I know that she owns the Company and I mean, I was just concerned about my job, that's why I didn't admit it that I was a Union supporter to her so that's what I told to her and she

> say, “You don’t have any credibility here, you are liar and whatever you say, I don’t believe you what you’re saying”.

Bustin's accusation about Sosa being a liar stems from an incident that had occurred at an antiunion meeting conducted by Oatman, where an employee became angry at Sosa's girlfriend, accusing Sosa of leading the organizing effort. His girlfriend was in tears; and so, believing that the human resource office was “there to represent us in case we have any problem,” Sosa took her there to protect her, to assure that she would not be badgered and harassed because of his union and protected activities. As a result, he lied when he told Bustin that he was not a Union supporter.

If that is what Respondent is relying on to prove that Sosa is an habitual liar, that is weak evidence indeed, certainly to Bustin, who presumably had labor relations experience and should have been well aware of the fact that employees do not for the most part want their union adherence to be a matter of public knowledge, certainly not by their employer. I do not believe Bustin. Because of Respondent’s failure to call as witnesses the two employees whom Sosa was supposed to have insulted, I find that Respondent has not met its burden under *Wright Line* of demonstrating that it would have disciplined Sosa even in the absence of his union activities. I conclude that Respondent violated Section 8(a)(3) and (1) of the Act. I am convinced that Respondent wanted to put a stop to Sosa’s attempt to elicit the aid of his fellow workers in organizing, an activity protected by Section 7 of the Act, even if, as the warning alleges, the three employees were made “uncomfortable.”

Prior to the union organizing drive, Sosa had to go from the time clock to the muscle meat area, near the maintenance department, and check for “rework” that had to be brought back to the kitchen department so that it could be remixed, and to obtain a knife that he had to put in the machine to emulsify the meat. Shortly before the election, Oatman announced to Sosa:

> I don’t want you to go no more and pick up the rework. You’re not going to be doing no more because I don’t want you to be talking with nobody. I don’t want you to go nowhere. . . .I want you to stay over there in your machine. If you’re going to drink water, you have -- you let me know. If you want to go to bathroom, you let me know. Whatever you want to do, you has to call me. I don’t want you to move. I don’t want you to go nowhere without telling me.

Oatman watched Sosa’s return from breaks. When he was seconds late, she singled him out for reprimand, ignoring similar conduct of other employees. Sosa complained to Bustin that there were 36 employees working in the kitchen and only he was being targeted with this restriction. Bustin replied that she was going to put Sosa on 30 days’ probation and that, after those 30 days, she and Oatman would review his behavior and decide whether to reduce the restrictions. Apparently, she took one of Sosa’s complaints to heart. Shortly after, she called all the first shift kitchen employees together and told them all that they had to ask for permission to go to the bathroom.

The harassment of Sosa continued after the election. In desperation, Sosa sought a meeting with Bustin, and they met in December. The events which followed need not be recited in detail, except to note that Sosa, believing that the human resources department was there to help him, made his complaints about how he was being poorly treated by Respondent and some of his fellow employees because of the simple fact that he was outspoken in favoring the Union. It is too much to suppose that Respondent would have sent him to the National Labor Relations Board to find a remedy. Perhaps Respondent could have merely ended its

harassment. The remedy that Bustin found was to assume that Sosa was mentally impaired and suggest to him that he file a workers' compensation claim for stress, which resulted in, among other things, Sosa, in a reverse form of interrogation, having to spill out his guts about his union activities and Respondent's reaction to them. (Anna Cruz, human resources generalist, who was responsible for handling Respondent's workers' compensation claims, told the insurer that Sosa was a "real troublemaker," a Union leader who caused the filing of unfair labor practice charges with the Board and who was harassing other employees to obtain their Union support.)

During the course of the investigation of Sosa's entitlement to workers' compensation, in late January 2001, Sosa became ill and went to the emergency room with a fever. He called in sick and returned to work on February 6, having missed two days due to illness. At about 11:30 a.m., Gerwig summoned Sosa to his office and asked whether he had brought a doctor's note. When Sosa said he had not, Gerwig said that he could not work without one, that he had been out six days. Sosa disputed that, noting that, even though six days had expired, Respondent's rules stated that an employee had to be absent for three days or more; and he, because of the weekend and days that Respondent had closed its business, had missed only two days. Nonetheless, Gerwig insisted that Sosa had to leave immediately, without finishing his shift, and obtain a doctor's note. Bustin confirmed that Respondent had to have a note because Sosa had gone to the emergency room, and sometimes the emergency room insisted that the employee not go to work for a certain amount of time. So Sosa went to the emergency room and obtained a note, which he gave to Gerwig, who checked with Bustin and returned to Sosa saying that the note was no good because it did not specify that he was able to return to full duty or that he had to be on light duty. (Sosa had been sick before and never had any trouble with the doctor's notes that he supplied, even though they made no mention of light or heavy duty.) Gerwig insisted that Sosa had to obtain a proper note, or else he could not work the next day. So Sosa had to return to the hospital to obtain yet another note.

Bustin's defense is twofold. First, she claims that all persons who were on workers' compensation had to produce doctor's notes. The short answer is that Sosa was not on workers' compensation, for which he had applied only because Bustin manipulated him into filing such a claim. Second, she testified that she had thought that Sosa had been hospitalized and that, therefore, a note was necessary. Nothing in Respondent's rules supports her rationale. Further, Sosa was not hospitalized and nobody asked him if he had been. Bustin concocted these reasons. Respondent was simply giving him trouble, as it had unlawfully done from the time that he started his union activities. Bustin's testimony that she learned from Joy Deshooter, the payroll manager, that Sosa was hospitalized was not corroborated by Deshooter and was contrary to what actually happened. I also discredit Bustin's testimony that Sosa called later in the day that he was supposed to work. There was no corroboration for that, either. He called the day before.

Bustin's persuasion of Sosa to seek workers' compensation resulted in his getting in even more trouble, because the insurer reported to Respondent that Sosa had said during his interview that: "I feel like maybe someday I am going to lose it all and do a crazy act and go do I don't know what." As a result, Bustin placed Sosa on a leave of absence pending a medical evaluation to determine whether he was fit to work. Despite his denial on February 15 that he said any such thing, Bustin announced that she did not believe him, which was consistent with her refusal to believe anything that he said, and had Gerwig escort him to his locker, where Gerwig ordered him to remove all of his belongings. Sosa justifiably believed that he had been fired, because employees who had been suspended, unlike him, had not been required to turn in their time cards or empty their lockers, or been escorted to the door.

What caused Bustin to review her discipline of Sosa is unclear, simply because I have so little faith in her credibility. But the accuracy of the translation of what Sosa had told the insurer was checked. In the meantime, in a memorandum dated February 22, Bustin advised Sosa that he was forbidden from Respondent's property and:

> you will be required to undergo a psychological evaluation by a medical professional of Kayem's choice (and at our expense) at a date and time to be determined. You will be allowed to return to work if we receive a medical report by the examining physician indicating that you do not pose a threat of harm and are capable of returning to work.

On February 26, Bustin and Petrillo listened to the tape of Sosa's interview and found that Sosa did not lie when he denied the threat. Rather, his comment to the insurer was non-threatening and benign, that he was fearful that Respondent's adverse attitude towards him was going to cause him to make a mistake in his work. Bustin called him, apologized, and asked him to return to work, which he did the next day; and Respondent made him whole for his lost pay.

Respondent contends that its actions were caused by the faulty translation, but there was unlawful conduct here. Bustin's very choice of a compensation claim for stress, rather than correcting Respondent's unlawful discrimination which gave rise to Sosa's complaints, was unlawfully motivated. There would never have been the insurer's interrogation, with the erroneous translation, had it not been for Bustin's willing acceptance of her supervisors' discriminatory conduct. Had it not been for Bustin's discrimination against Sosa, refusing to believe him at any cost and accepting others' hearsay declarations, Sosa, who otherwise (but for his union activities) was considered a good employee and a good worker, would have been believed or his denial would have first been investigated before making him leave the facility under circumstances which led him to believe that he had been fired. I conclude that Respondent violated Section 8(a)(3) and (1) by placing Sosa on an indefinite leave of absence and Section 8(a)(1) by harassing him by restricting his movement around the plant during working hours and insisting on a doctor's note, when its rules required none.

On July 31, 2001, Respondent posted a job for the CT area team leader. Among the requirements were: "Must be able to operate the oven and all the equipment in the Kitchen. Must be fluent in English and be able to fill out paper work like productivity reports and other miscellaneous paper work." Sosa, Angel Morillo, Hector Zelaya, and Marcos Zelaya applied. The two leading candidates were Morillo and Sosa. Sosa had worked in the old kitchen for six years and knew how to operate all the equipment, except for the continuous oven. That was no impediment to Sosa's selection, because, Manager Walsh testified, although the team leader would have to operate it, he did not have to have prior knowledge about how to operate the oven. In other words, he could be trained on the job. Morillo was also a qualified worker. Indeed, while Walsh was on vacation, he had watched over the CT area, doing such a good job that Gary, vice president of manufacturing, extolled him; and Walsh asked Gary if Morillo had done such a good job, could she have another team leader.

Walsh testified that Morillo was her "best candidate" because he "was the most trained person on that job, he did a lot on his own, he has learned every job in that department, . . . [and] he took the initiative to go on and learn every job in that department. . . . He has got along with the other employees very well, good attitude." Petrillo, however, was conflicted, believing that both Morillo and Sosa could perform the job very well, but she had a concern about Morillo's English comprehension "because we was asking for the person to be fluent in english and I feel like Angel doesn't understand my questions during the interview." Her problem was resolved by Bustin's removal of the English fluency requirement from the job requirements.

With the sticking point of Morillo's lack of English comprehension removed, Respondent could well justify, at least arguably, its selection of Morillo on August 27, although it would not have been incorrect to select Sosa. By the time Sosa applied for the CT team leader position in August 2001, Respondent had a thorough knowledge of his union activities, and it had already demonstrated its animus toward him by committing numerous unfair labor practices. The General Counsel proved a prima facie case under *Wright Line*; and the issue then becomes whether, if the second candidate had been anyone other than Sosa, would Respondent have removed the English fluency requirement after the fact. In other words, was it the identity of Sosa that offended Bustin?

There is enough here, as opposed to the earlier allegations of denial of promotions, that indicates that Sosa was a very special case. He was qualified for this job. Morillo was not. Then, Bustin removed an essential requirement for the job so that Sosa would not get the job, and I discredit Bustin's testimony that that was not the reason. She was out to get Sosa, disregarding Walsh's specific wish to have as team leader someone who was fluent in English. Not only that: Bustin changed others of her regular procedures, conducting reference checks and interviewing other team leaders, something that she did not typically do, and something to bolster the candidacy of Morillo. Indeed, the team leaders seem to be uniformly opposed to the Union, and it was only natural that they should not be enamored with their nemesis, Sosa. I find that Respondent did not meet its burden of showing that, notwithstanding its discrimination of Sosa, it would have still selected Morillo. I conclude that Respondent violated Section 8(a)(3) and (1) of the Act by failing to promote Sosa to the position of team leader.

About a week after Sosa was disciplined for harassment on September 29, 2000, Jose Hernandez was taken to Tomaszewski's office to meet with him, Bustin, and Petrillo. Bustin said that he had been harassing employees by talking about the Union during work hours. Hernandez demanded to know who was accusing him, but Bustin replied that they wanted to remain anonymous. Hernandez said that it was a lie, as shown by the fact that Bustin could not produce anybody, and that she was trying to intimidate him in the same way that she had tried to intimidate Sosa a week before. She denied it, but said that "we were in America that this was a free country and that I could do whatever I wanted but to do it in the lunch time or on my break time." Hernandez said that that was the time that he did it, and that he even handed out fliers to the supervisors in the cafeteria.

Hernandez testified that Bustin asked him whether he knew anything about the Union. She denied the accusation, because she already knew of his Union involvement, and that she did not discipline him because:

> We had one complaint. It was relatively minor. It happened outside of the company. But I told Jose, I said, "Jose, I do not want this to get out of control. We had already written other people up for harassment. We are just letting you know that it is not okay to proceed in this manner."

In late January 2001, Hernandez received permission from his second-shift supervisor, Santiago, to arrive 15–30 minutes late on Mondays and Wednesdays because he was attending English classes which did not end until 1:00 p.m., the time that he was scheduled to start work. Frank Marshall, the morning supervisor who finished at 2:00 p.m., when Santiago was to start his shift, was standing by the time clock on January 29 when Hernandez came to punch in. Marshall complained, stating that Hernandez had to punch in five minutes before 1:00 p.m., despite the fact that everybody else punched in two or three minutes late, without discipline. Hernandez told him that he had obtained permission from Santiago to start late, but Marshall

denied knowing of that. The next day, Hernandez was in the bathroom at 12:55 p.m., changing his clothes, and Marshall yelled at him in front of other employees that today was Tuesday and he was not studying today, so he had no excuse. Hernandez "changed fast" and went to his work place, where he punched in one minute after the hour. Before, he had punched in on time or within one or two minutes of the hour and had not been reprimanded. In order to get relief from Marshall, Hernandez went to see Gerwig, who immediately asked when he had punched in. Thinking that, because of Gerwig's remark, it was useless to complain to him, he went to see Tomaszewski, who said that he would talk to Marshall, whose harassment stopped for a week. But it started again, so Hernandez went to see Bustin, who said that he had to see Marshall's supervisor, Peter Monkiewicz.

Marshall denied that he knew of Hernandez's union activities, but Hernandez was so open about them (he had been the Union's observer at the 2000 election) and so outspoken (he repeatedly challenged Walsh's declarations at an antiunion meeting) that I do not believe Marshall. I find that Respondent's timing of its initial harassment of Hernandez, as well as Sosa, was pinned to the ongoing union campaign, that no one had watched Hernandez before, that no one had reprimanded Hernandez for tardiness before, and that others had been late, without reprimand or discipline. I conclude that Bustin's warning of him in early October 2000 and Marshall's conduct in January 2001 constituted additional harassment, in violation of Section 8(a)(1) of the Act. I do not credit Hernandez's testimony that he was also interrogated by Bustin at the earlier meeting. Hernandez testified that she asked him if he knew anything about the Union. I believe Bustin's testimony that she knew of his sympathies and had no reason to ask him.

Hernandez, like Sosa, was not promoted to a position, second shift smoker, that he had bid for in February 2001. Hernandez was one of two candidates and had been working as a smoker's helper for approximately seven months. The successful candidate, Norman Cruz, had held the position of a smoker before for two years. Both employees had been disciplined. Hernandez was disciplined for making incorrect notations on USDA forms, which, even though he had corrected them, was improper because the USDA inspector could question which was the correct entry. Cruz had been disciplined on three occasions: he had been suspended for three days for not showing up for work and not calling in. He had been orally warned for failing to follow his team leader's instructions and warned in writing for failing to change his coat when entering the packing room. Santiago's answers gave me the impression that he really did not consider the seriousness of Cruz's discipline, particularly the first discipline. On the other hand, he explained to Hernandez that he thought that Hernandez was a very good worker, but simply had not had enough experience, and that Cruz had the requisite experience. Based on this record, although the General Counsel probably proved a prima facie case under *Wright Line*, Respondent nonetheless proved that it would have promoted Cruz because of his greater experience, even though Hernandez had less meaningful discipline. I dismiss this allegation.

In September 2001, a rally was held outside Respondent's facility, attended by politicians, representatives of community organizations, the AFL-CIO, affiliated unions, and various of Respondent's employees, including Sosa, Suero, Satter, and Daniel Avalos. Sosa and Satter spoke at the rally about safety problems at the facility, including a report issued by the Massachusetts Coalition for Occupational Safety and Health based on employee interviews. The rally was followed by two events: OSHA issued a report finding safety violations and fining Respondent $16,000, and two Boston newspapers printed articles about Respondent's safety problems.

Within two weeks, on October 4, 2001, Respondent issued warnings to Satter, Avalos, and Hernandez for not wearing safety glasses: Hernandez's was a written warning; those to Avalos and Satter were oral warnings. The next day, Tomaszewski and Night Supervisor Paul

Broderick met with Avalos and Satter. Tomaszewski explained that he had a problem that employees on his shift were not wearing their safety glasses. That was very dangerous; they could get chemicals in their eyes. He kept telling different employees to wear them and they just did not seem to want to do it. Avalos and Satter were "some of our best guys on the shift," and how could he expect others to follow the rules if they did not. The employees complained that they did not believe that they were required to wear safety glasses while performing the work that they were doing, that Respondent's policy was unclear, and that they had not been properly trained. In fact, Respondent's procedures maintained on the floor of the facility did not specify that they were required to wear safety glasses under the particular circumstances; but Broderick found a page in his own training manual that sustained his position, even though the employees did not know of it. More importantly, when Satter asked whether anyone else was being warned, the response was, "[N]o, you're the only two who are going to get a warning, but we're going to tell everybody else that you're getting a warning."

The issue then becomes the motivation for Respondent's selection of these two employees, whether as an example to the others, or because of their participation in the rally, a concerted and protected activity. An answer is suggested from, among other facts, the section of their oral warnings entitled, "Action to be taken if not corrected." Respondent wrote: "Suspension if not corrected!" Although Respondent had in the past issued oral warnings, in all instances where it indicated the action to be taken if not corrected, it threatened a written warning. In no other instance did it indicate that the next step of discipline, which would normally be a written warning, was to be a suspension. I discredit Tomaszewski's explanation that the threat of a suspension did not "mean that directly goes into suspension. But if it was kept up, the end result would be suspension." That flies in the face of what the warning makes eminently clear. The warnings were thus disparate and were not meant to be an example to the other employees but a warning to punish Sutter and Alvarez. Because Tomaszewski lied about the clear meaning of the warnings, I find that he also lied about his motivation. Neither Sutter nor Alvarez were aware that they had to wear their glasses, and such a requirement was omitted from Respondent's training manual that was accessible to the employees. I conclude that Respondent disparately enforced its work rules and issued oral warnings to Satter and Avalos because of their participation in the rally, in violation of Section 8(a)(3) and (1) of the Act.

The written warning issued to Hernandez stands on a lesser footing. Hernandez did not attend the safety rally, and his warning was not inconsistent with Respondent's prior practice. Although Hernandez certainly was a leading adherent of the Union and the warning's timing is suspect, Hernandez was not wearing his safety glasses and had previously been told to wear them. His claim that he had just briefly removed his glasses was, in fact, an admission that he knew that he was to wear them. His union adherence does not protect him from a clear violation of Respondent's rules. I dismiss the allegations that Respondent's discipline of him was disparate and that its warning violated the Act.

In mid-October, Satter saw Avalos being accompanied by Broderick and emptying out his locker. That indicated to Satter that Avalos had been fired, although Broderick refused to answer Satter's inquiries. Satter then talked to other sanitation employees on the shift and told them that he thought that Respondent was trying to fire Avalos and that they should try to prevent it. It was decided that the employees would go to the human resources office the following Wednesday. Satter arrived at the plant shortly before 8:00 p.m., an hour before his scheduled starting time and talked with some of the workers with whom he had previously talked and again "talked about just going to the Human Resources office, and right at that time to ask about, you know, what the deal was with Daniel, whether he was fired or suspended, what was going on, because, you know, nobody knew."

So the group, consisting of Satter, Juan Cruz, William Avalos, Luis Rodas, Carlos Alvarez, Jose Rodas, Merlin Romero, and Martin Rosas walked to the office; Satter knocked on the door; and Anna Cruz signaled for him to come in. As many as could fit, probably three, went into the small office, with the remainder staying outside, and Satter said: "[W]e're concerned about Daniel, we wanted to know what the deal was with him, is he suspended, is he fired, what actually is going on?" Cruz replied that she had just returned to work and did not know. She agreed to schedule a time when the employees could meet with someone who did know. She suggested a date, and Satter said that was acceptable; and the group started to leave. As they were doing so, Satter translated into Spanish what Cruz had said. Someone said: "[O]h, she knows." Cruz answered: "[W]hat did you say?" The employees, all of whom had clocked in before going to the human relations office, returned to their work stations by 8:00 p.m., their normal starting time.

Tomaszewski and Broderick called Satter into their office. Tomaszewski berated him, asking him who had authorized him to speak for Respondent's employees: "[Y]ou don't speak for Kayem workers, this is none of your business. . . . I won't have a lynch mob going down to Human Resources on my shift. Were you aware that other workers were on the clock?" He threatened to talk to "high level management." Satter denied that there was any lynch mob and told them that there was a totally civil discussion and the employees were concerned about a coworker. Tomaszewski told Satter to make sure that this did not happen again, that if he had any questions, he should make an appointment with the human resources manager. He had no right running up there, with employees calling Cruz names ("a liar"). The employees were supposed to be in their work stations, but they punched in and went downstairs to see her.

Tomaszewski and Broderick then called a meeting of the sanitation crew and asked what time they punched in. They said 7:55 a.m. He said that, when they punched in, they were to go to work, and nowhere else. They said that they reported on time at their work stations, after they had gone to see Cruz. Tomaszewski asked them, rhetorically, who did they think they were. The employees remained silent. He was giving them all oral warnings, not formal warnings. And, the next day, October 18, Broderick gave them oral warnings for not reporting to their work station after punching in and taking an unauthorized break. That included Carlos Rodas, who testified that he was not even there and so told Tomaszewski and Broderick. (Broderick testified that the one who told him that he was not there was Jose Rodas, and no warning was given to him.)

There was nothing in this incident that should have scared Ruiz, and I find that she was not. That an employee may have expressed disbelief that she knew what was happening to Alvarez, even to the extent of calling her a liar, is not so outrageous that the conduct of all should have been called into question. Furthermore, Respondent did not warn the employees because they scared Ruiz or acted inappropriately toward her. The warnings merely state that they did not report to their work station after they punched in and that they took an unauthorized break. The corrective action required was that they had to report to their work station after punching in. Respondent's defense that it was disciplining its employees for their treatment of Ruiz is a mere afterthought. What really concerned Respondent was that it did not want a group of its employees to protest in a concerted manner the treatment of another employee either presently or in the future (according to Bustin, Respondent "just want[ed] to make sure we're not losing groups of employees over and over again"); but Section 7 of the Act protects this very type of concerted activity. *General Electric Co.*, 321 NLRB 662, 677 (1996), citing *Buck Brown Contracting Co.*, 283 NLRB 488, 513 (1987). Finally, whether Carlos or Jose Rodas was actually present is of no consequence. The point is that Respondent thought that one or the other was present and issued a warning because of that employee's perceived concerted, protected activity.

I conclude that Respondent issued oral warnings to Juan Cruz, Carlos Alvarez, William Avalos, Carlos Rodas, and Luis Rodas in violation of Section 8(a)(1) of the Act. Although not stated as a separate violation, I would be remiss in not concluding that Tomaszewski also violated Section 8(a)(1) of the Act by threatening employees with future punishment for engaging in concerted and protected activities.

The next night following the warnings, Broderick clamped down on his employees' freedom of movement. He called a meeting to announce that lunch time would not be at 12:30 a.m., but at 11:00 p.m. The break would be at 1:30 a.m. When an employee needed to use the rest room, he had to ask permission from the team leader or wait until the supervisor arrived. The employees complained that sometimes they could not wait: his answer, "he didn't care." Broderick contended that employees in his department had been taking too many unauthorized breaks "for some time," but it seems clear that what motivated Broderick's sudden decision was the unauthorized break his employees took, for which he had issued the warnings the day before. I am not persuaded that he would have changed any rules, had the employees not gone to Cruz's office to inquire about Daniel Avalos. I conclude that Respondent imposed these more stringent work rules on its employees because of their concerted, protected activities, in violation of Section 8(a)(1) of the Act.

The last two allegations relate to Henry Alvarez and Satter, who were given warnings for leaving their jobs without permission. Alvarez testified that on the Monday after an antiunion meeting conducted by Walsh and Jaime during the pre-November 22 election period, at which Alvarez questioned the views of management, he received a message about a telephone call from the school that his son attended, indicating that something had happened to his son. He looked for Walsh, but could not find her; so he left a message with two other employees, Luis Ortiz and Morillo. He went to the school, found his son, not feeling well, in the principal's office, and took him home. Alvarez then returned to work, being absent for about two hours. Alvarez's credibility was, however, suspect. In his investigatory affidavit given to the Region, he denied having ever been disciplined. However, he had not one, but two, prior warnings. It is possible to forget one earlier warning, but much more difficult to forget two, unless he purposely disregarded to the truth. Second, he did not mention Morillo's name in his affidavit; he mentioned only Ortiz. In addition, his narration was not corroborated by either Ortiz or Morillo. He was confused about how he received the message about his son. There was no corroboration of his son's illness. In sum, his case was woefully weak, based primarily on the coincidence of the timing of the discipline, the day after the meeting.

I find no prima facie case here. Alvarez left without permission, and his discipline was not inconsistent with his prior disciplinary record or with the violation. Walsh also had substantial credibility problems, and I have not found many of her denials of unlawful conduct credible; but in this instance I find her testimony accurate. Thus, even if there had been presented a prima facie case under *Wright Line*, I find that Respondent would have given Alvarez the same discipline. I specifically credit her testimony that she saw Alvarez leaving the facility, and he said nothing; that, if a telephone message of an emergency is received by Respondent, that message is relayed to the supervisor, who then tells the employee; that she never indicated to Alvarez that she would not discipline him; and that she saw Ortiz, and she never received such a message. I dismiss this allegation

The complaint also alleges that about November 30, 2000, Respondent suspended Satter for three days. On November 28, Satter reported to work at 1:30 p.m. Team leader Marcos Zalaya was out that day. Satter was running the pickle machine and about 3:30 p.m. Supervisor Santiago asked him what he was doing that day, and he replied that he had a

minimal amount to do, to which Santiago replied that that was good and Santiago confirmed that that was good. After he finished pumping the meats, he clocked out at 6:49 p.m. Although he had clocked out early in the past, he had done so always with the permission of his supervisors. Never had he clocked out so early, after less than five hours of work.

The next day, at a meeting with Santiago, Gerwig, and Petrillo, Gerwig suspended him for three days, over Satter's protestations that he had left because he thought that there was no more work to do that day. Gerwig and Santiago explained that Satter still needed to seek permission from a supervisor before leaving the plant. When Satter explained that there was just a "problem of miscommunication" and that he should not be suspended because he had never had any other disciplinary problem. Gerwig's reply that there was an automatic suspension for this kind of violation may have been overstated, but Respondent showed that, in the past, it has suspended an employee, Hector Colon, for three days for the identical violation.

I find no violation here, not even a prima facie case. None of Respondent's representatives appeared to have any knowledge of Satter's union activities, if indeed there were any. Even Satter acknowledged that, as of the date of the suspension, he had never told his supervisor, Sandro Santiago, that he supported the Union; he had never told anyone in management that he supported the Union; and he never wore any button during the campaign that would signify that he was a Union supporter. The fact that he may have talked with Sosa from time to time was meaningless. I dismiss this allegation.

Remedy

Having found that Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, Respondent must rescind its oral warning to Sosa on July 14, 2000, its unfavorable memorandum placed in its personnel file of Sosa on August 21, 2000, its final warning to Sosa on September 29, 2000, its warnings to Satter and Daniel Avalos on October 4, 2001, and its warnings to Juan Cruz, Carlos Alvarez, William Avalos, Carlos Rodas, and Luis Rodas on October 18, 2001. Respondent must also rescind the new lunch and break periods imposed in the sanitation department.

Respondent, having failed to promote Sosa to the position of CT area team leader on August 27, 2001, must offer him that position and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of its failure to offer him that promotion to the date of its proper offer of promotion, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). In addition, Respondent, having unlawfully changed Sosa's starting time in the old kitchen on August 21, 2000, must make him whole for any loss of earnings and other benefits, if any, that he suffered, as computed above.

The General Counsel requests that Respondent be required to reimburse Sosa for any extra federal, state, or local income taxes that would or may result from his receipt of a lump sum backpay distribution in one tax year as a backpay award for a multi-year period that would have encompassed several tax years. This is reasonable. The purpose of the Act's remedial provisions is to place adversely affected discriminatees into positions where they would have been, had the Act not been violated. By being paid backpay in a later year, Sosa may be required to pay taxes at a higher rate and may lose actual net income that he would have received, had the discrimination not occurred. The computation that the General Counsel requests may result in a substantial amount, because the reimbursement would itself be

taxable, and thus Respondent's payment may be compounded; but it was Respondent which violated the Act and which must be held accountable.

On these findings of fact and conclusions of law and on the entire record, including my observation of the demeanor of the witnesses as they testified and my consideration of the briefs filed by the General Counsel and Respondent, I issue the following recommended[10]

ORDER

Respondent Kayem Foods, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening its employees that it would relocate and could move out of state, go bankrupt, or sell its business if they selected the Union as their collective-bargaining representative.

(b) Threatening its employees with reduced wages and loss of insurance benefits, holidays, and personal days, if they selected the Union as their collective-bargaining representative.

(c) Stating or implying to its employees that it would be futile for them to select the Union as their collective-bargaining representative by telling them that negotiations over wages and benefits would start at zero if they selected the Union as their collective-bargaining representative.

(d) Stating or implying to its employees that it would be futile for them to select the Union as their collective-bargaining representative by telling them that its rules and policies would not change; that it and the Union would each maintain its own rules; that no one could force it to pay higher wages and that all its employees would be able to do is strike; and that, if the Union went on strike, its employees would lose their jobs and would be unable to feed or provide medical care to their children.

(e) Threatening and implying that its employees would lose their jobs by telling them that its customers would leave because its employees selected the Union as their collective-bargaining representative.

(f) Threatening its employees that, if they selected the Union as their collective-bargaining representative, they had to have valid work permits in order to continue working, because the Union would require them and that the Union was not going to protect, but would harm, its undocumented employees.

[10] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(g) Implying to its employees that it would go bankrupt if they selected the Union as their collective-bargaining representative because other companies had gone bankrupt after they were unionized.

(h) Informing its employees that, if they selected the Union as their collective-bargaining representative, negotiations with the Union about wages and benefits would start at zero or from scratch and that the Union would have to bargain to recover some or all of their wages and benefits, if they selected the Union as their collective-bargaining representative.

(i) Interrogating its employees about their union sympathies.

(j) Soliciting its employees' complaints and grievances and promising to resolve them and promising its employees improved terms and conditions of employment if they refrained from selecting the Union as their collective-bargaining representative

(k) Informing its employees that it would strictly enforce its rules and they would be fired if they arrived one minute late if they selected the Union as their collective-bargaining representative

(l) Threatening its employees with plant closure if they selected the Union as their collective-bargaining representative by telling them that, if they wanted Respondent to close, they should vote for the Union.

(m) Harassing its employees in retaliation for their union activities.

(n) Harassing its employees by attempting to restrict their movement around the plant during working hours, in retaliation for their union activities

(o) Disparately enforcing work rules in retaliation for its employees' union activities

(p) Imposing more stringent work rules on its employees because of their concerted and protected activities.

(q) Issuing oral and final warnings to its employees in retaliation for their union activities and to discourage them from engaging in union and protected and other concerted activities.

(r) Placing unfavorable memoranda in the personnel files of its employees because they engaged in union activities.

(s) Changing its employees' starting times because they engaged in union activities.

(t) Failing to promote its employees for the positions of team leader because they engaged in union activities.

(u) Placing its employees on indefinite leaves of absence because they engaged in union activities.

(v) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the new lunch and break periods imposed in its sanitation department.

(b) Within 14 days from the date of this Order, promote Wilmer Sosa to the position of CT area team leader, replacing, if necessary, any employee occupying that position, or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(c) Make Wilmer Sosa whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful oral and final warnings issued to Wilmer Sosa; the unfavorable memorandum, dated August 21, 2000, placed in Sosa's personnel file; the warnings issued to Brock Satter and Daniel Avalos on October 4, 2001; and the oral warnings issued to Juan Cruz, Carlos Alvarez, William Avalos, Carlos Rodas, and Luis Rodas on October 18, 2001; and within 3 days thereafter notify the employees in writing that this has been done and that the warnings and memorandum will not be used against them in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facility in Chelsea, Massachusetts, copies of the attached notice marked "Appendix."[11] Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since .

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

[11] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. January 17, 2003

Benjamin Schlesinger
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT threaten our employees that we would relocate and could move out of state, go bankrupt, or sell our business if they selected the United Food and Commercial Workers, Local 1445, AFL-CIO (Union) as their collective-bargaining representative.

WE WILL NOT threatening our employees with reduced wages and loss of insurance benefits, holidays, and personal days, if they selected the Union as their collective-bargaining representative.

WE WILL NOT state or implying to our employees that it would be futile for them to select the Union as their collective-bargaining representative by telling them that negotiations over wages and benefits would start at zero if they selected the Union as their collective-bargaining representative.

WE WILL NOT state or imply to our employees that it would be futile for them to select the Union as their collective-bargaining representative by telling them that our rules and policies would not change; that we and the Union would each maintain its own rules; that no one could force us to pay higher wages and that all our employees would be able to do is strike; and that, if the Union went on strike, our employees would lose their jobs and would be unable to feed or provide medical care to their children.

WE WILL NOT threaten and imply that our employees would lose their jobs by telling them that our customers would leave because our employees selected the Union as their collective-bargaining representative.

WE WILL NOT threaten our employees that, if they selected the Union as their collective-bargaining representative, they had to have valid work permits in order to continue working, because the Union would require them and that the Union was not going to protect, but would harm, our undocumented employees.

WE WILL NOT imply to our employees that we would go bankrupt if they selected the Union as their collective-bargaining representative because other companies had gone bankrupt after they were unionized.

WE WILL NOT inform our employees that, if they selected the Union as their collective-bargaining representative, negotiations with the Union about wages and benefits would start at zero or from scratch and that the Union would have to bargain to recover some or all of their wages and benefits, if they selected the Union as their collective-bargaining representative.

WE WILL NOT interrogate our employees about their union sympathies.

WE WILL NOT solicit our employees' complaints and grievances and promise to resolve them and promise our employees improved terms and conditions of employment if they refrained from selecting the Union as their collective-bargaining representative

WE WILL NOT inform our employees that we would strictly enforce our rules and they would be fired if they arrived one minute late if they selected the Union as their collective-bargaining representative

WE WILL NOT threaten our employees with plant closure if they selected the Union as their collective-bargaining representative by telling them that, if they wanted Respondent to close, they should vote for the Union.

WE WILL NOT harass our employees in retaliation for their union activities.

WE WILL NOT harass our employees by attempting to restrict their movement around the plant during working hours, in retaliation for their union activities

WE WILL NOT disparately enforce work rules in retaliation for our employees' union activities

WE WILL NOT impose more stringent work rules on our employees because of their concerted and protected activities.

WE WILL NOT issue oral and final warnings to our employees in retaliation for their union activities and to discourage them from engaging in union and protected and other concerted activities.

WE WILL NOT place unfavorable memoranda in the personnel files of our employees because they engaged in union activities.

WE WILL NOT change our employees' starting times because they engaged in union activities.

WE WILL NOT fail to promote our employees for the positions of team leader because they engaged in union activities.

WE WILL NOT place our employees on indefinite leaves of absence because they engaged in union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL rescind the new lunch and break periods imposed in our sanitation department.

WE WILL within 14 days from the date of the Board's Order, promote Wilmer Sosa to the position of CT area team leader, replacing, if necessary, any employee occupying that position,

or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Wilmer Sosa whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, with interest.

WE WILL within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful oral and final warnings issued to Wilmer Sosa; the unfavorable memorandum, dated August 21, 2000, placed in Sosa's personnel file; the warnings issued to Brock Satter and Daniel Avalos on October 4, 2001; and the oral warnings issued to Juan Cruz, Carlos Alvarez, William Avalos, Carlos Rodas, and Luis Rodas on October 18, 2001; and within 3 days thereafter notify the employees in writing that this has been done and that the warnings and memorandum will not be used against them in any way.

_____

KAYEM FOODS, INC.

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

10 Causeway Street, Boston Federal Building, 6th Floor, Boston, MA 02222–1072

(617) 565-6700, Hours of Operation: 8:30 a.m. to 5 p.m.